

April 1, 2003

Ref: 8ENF-L

SENT VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Aurene M. Martin  
Acting Assistant Secretary-Indian Affairs  
U.S. Department of the Interior  
1849 C Street N.W.  
Washington, D.C. 20240

Steve Yellow, Facilities Manager  
Standing Rock Agency  
Bureau of Indian Affairs  
U.S. Department of the Interior  
P.O. Box E  
Fort Yates, ND 58538

Cora L. Jones, Regional Director  
Great Plains Regional Office  
Bureau of Indian Affairs  
U.S. Department of the Interior  
115 Fourth Avenue S.E.  
Aberdeen, SD 57401

Re: In the Matter of U.S. Department of Interior,  
Ft. Yates Law Enforcement Facility  
Docket No.  
Complaint and Notice of Opportunity for Hearing

Dear Assistant Secretary Martin, Regional Director Jones and Mr. Yellow:

The U.S. Environmental Protection Agency Region 8 ("EPA") is issuing the enclosed Complaint and Notice of Opportunity for Hearing ("Complaint") to the Bureau of Indian Affairs ("BIA") for alleged underground storage tank ("UST") violations at the Ft. Yates Law Enforcement Facility, Standing Rock Agency, Ft. Yates, North Dakota. The Complaint is issued pursuant to section 9006 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991e.

EPA alleges in the Complaint that BIA failed to comply with the federal UST regulations codified at 40 C.F.R. Part 280, Subpart D, for one UST located at the Ft. Yates Law Enforcement Facility, Proposal Avenue, Building 51, Ft. Yates, North Dakota, in violation of RCRA § 9003(c), 42 U.S.C. § 6991b(c).

You have the right to a hearing to contest the factual allegations in the Complaint. If you admit the allegations, or the allegations are found to be true after you have had an opportunity for a hearing, you have the right to contest the penalty proposed in the Complaint. A copy of EPA's administrative procedures is enclosed for your review. Please note the requirements for an Answer set forth in 40 C.F.R. §§ 22.15 and 22.38. If you wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, you must file a written Answer within thirty (30) days of receipt of the enclosed Complaint with the EPA Regional Hearing Clerk at the following address:

Ms. Tina Artemis, Regional Hearing Clerk (8RC)  
U.S. EPA, Region 8  
999 18<sup>th</sup> Street, Suite 300

Denver, CO 80202-2466

If you do not file an Answer by the applicable deadline, it will have defaulted and each allegation in the Complaint will be deemed to be admitted as true. You will have waived your right to appear in this action for any purpose and will also have waived your right to be notified of any Agency proceedings that occur before a civil penalty may be imposed. Provided that the Complaint is legally sufficient, the Presiding Officer will then find you liable for a civil penalty, and the Regional Administrator may then assess against you a civil penalty of up to \$11,000 per violation for the alleged violations.

Whether or not you request a hearing, you may confer informally with EPA concerning the alleged violations or the amount of the proposed penalty. You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA, but it is not required. A request for an informal conference does not extend the thirty (30) day period for filing your Answer and/or requesting a hearing.

If you have any questions, the most knowledgeable people on my staff regarding this matter are Amy Swanson and Lisa Luebke. Ms. Swanson is in our Legal Enforcement Program and can be reached at (303) 312-6906. Ms. Luebke is in our Underground Storage Tank Program, and can be reached at (303) 312- 6256.

We urge your prompt attention to this matter.

Sincerely,

**SIGNED**

Sharon Kercher  
Technical Enforcement Director  
Office of Enforcement, Compliance and  
Environmental Justice

Enclosures: Consolidated Rules of Civil Procedure, 40 C.F.R. part 22  
Complaint and Notice of Opportunity for Hearing, with Exhibits 1 and 2

cc: Jerry Gidner, BIA  
Bob Buffalo Boy, Standing Rock Sioux Tribe

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

IN THE MATTER OF:	)	Docket No. <b>RCRA-08-2003-0001</b>
	)	
U.S. Department of Interior	)	<b>COMPLAINT AND NOTICE OF</b>
Bureau of Indian Affairs,	)	<b>OPPORTUNITY FOR HEARING</b>
Great Plains Region and	)	
Standing Rock Agency	)	
	)	
(Ft. Yates Law Enforcement Facility	)	
BIA Standing Rock Agency	)	
Proposal Avenue, Building 51	)	
Ft Yates, ND 58538)	)	
	)	
Respondents.	)	
_____	)	

**AUTHORITY**

This is a civil administrative action issued under the authority vested in the Administrator of the Environmental Protection Agency ("EPA") by Section 9006 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991e. The Administrator has properly delegated this authority to the undersigned EPA officials. This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits ("Consolidated Rules") set forth at 40 C.F.R. Part 22, a copy of which is enclosed.

**GENERAL ALLEGATIONS**

1. Subtitle I of RCRA, RCRA §§ 9001 - 9010, 42 U.S.C. §§ 6991 - 6991i, authorizes EPA to regulate the installation and use of "underground storage tanks" which contain "regulated substances."

2. Pursuant to Section 9006(d)(2) of RCRA, 42 U.S.C. § 6991e(d)(2), any owner or operator of an underground storage tank who fails to comply with any requirement or standard promulgated by the Administrator under section 6991b of this title shall be subject to a civil

penalty not to exceed \$10,000 for each tank for each day of violation.

3. EPA is authorized to issue orders to and assess penalties against federal facilities pursuant to RCRA §§ 6001(b)(1) and 9007, 42 U.S.C. §§ 6961(b)(1) and 6991f.

4. EPA has jurisdiction over this matter pursuant to RCRA § 9006, 42 U.S.C. § 6991e.

5. Section 9003(c)(1) of RCRA, 42 U.S.C. § 6991b(c)(1), authorizes EPA to promulgate regulations setting forth requirements for maintaining a leak detection system, an inventory control system together with tank testing, or a comparable system or method designed to identify releases in a manner consistent with the protection of human health and the environment. EPA has promulgated such regulations at 40 C.F.R. Part 280, Subpart D.

6. Petroleum and any fraction thereof is a regulated substance as defined at RCRA § 9001(2), 42 U.S.C. § 6991(2).

7. EPA is the “implementing agency” as that term is used at 40 C.F.R. § 280.12.

8. BIA, a bureau of the United States Department of the Interior, is an “owner” or “operator” within the respective meanings of RCRA §§9001(3) and (4), 42 U.S.C. §§ 6991(3) and (4), and 40 C.F.R. § 280.12 of an “underground storage tank system” (“UST” or “UST system”) as defined by RCRA § 9001(1), 42 U.S.C. § 6991(10), and 40 C.F.R. § 280.12.

9. Respondents own or operate a 5,000 gallon gasoline UST ( identified as EPA Facility Id No. 3040013) installed in 1985 located at the Ft. Yates Law Enforcement facility (“facility”), Building 51, Proposal Avenue, Ft. Yates, North Dakota, within the exterior boundaries of the Standing Rock Sioux Indian Reservation.

10. The UST was upgraded with automatic tank gauging (“ATG”) as the method for monthly leak detection monitoring prior to the December 22, 1998 tank upgrade deadline.

11. Pursuant to the requirements of 40 C.F.R. § 280.41, all UST owners and operators must monitor tanks at least every thirty (30) days for releases using one of the methods listed in 40 C.F.R. § 280.43, including automatic tank gauging.

12. On June 14, 2002, Reuben Whitebull of the Standing Rock Sioux Tribe Environmental Program provided Mr. Steve Yellow, BIA Standing Rock Agency Facilities Manager, with advance notice of a planned UST inspection of the facility. Mr. Yellow was asked to have the following facility records available at the time of the inspection: the last 12 months of leak detection records and information regarding the type of leak detection method in use.

13. On June 18, 2002, EPA inspectors Joe Taylor and Francisca Chambus (“the inspectors”), accompanied by Mr. Whitebull, conducted an inspection at the facility to determine compliance with RCRA Subtitle I and the EPA regulations relating to USTs.

14. At the time of the inspection, Mr. Yellow informed the inspectors that no leak detection records could be produced as the printouts from the ATG had been left on the floor and discarded by maintenance staff.

15. The inspectors noted that there was an undetermined amount of product in the UST at the time of the inspection. The inspectors further observed that the tank was fully operational and connected to a fill pipe complete with butterfly valve and a spill bucket.

16. Mr. Yellow informed the inspectors that the UST was no longer in use and, as of the week prior to the inspection, placed in temporary closure status. Mr. Yellow stated that Respondents planned to remove the UST.

17. At the conclusion of the inspection, the inspectors informed Mr. Yellow that the facility was out of compliance and explained the violations. The inspectors completed a “Notice of Inspection” form which was signed by both the inspectors and Mr. Yellow. The inspectors also provided Mr. Yellow with a closure packet regarding proper closure of the UST, including a copy of the 30 Day Advance Closure Notification form..

18. On July 10, 2002, Mr. Bob Buffalo Boy, Standing Rock Sioux Tribe Environmental Director, took a gauge stick reading of the facility’s UST at EPA’s request and determined that the UST contained approximately 3 inches of fuel.

19. On August 22, 2002, Mr. Bob Buffalo Boy further investigated the facility at EPA's request. He was provided records establishing that the UST had last been filled on December 14, 2001. He also retrieved and copied ATG printouts from the UST that were scattered on the floor. According to the ATG printouts recovered, fuel was last pumped from the UST on or around February 1, 2002.

20. On September 3, 2002, EPA received copies of the ATG strips collected by Mr. Bob Buffalo Boy for the UST. According to the printouts, 3.8 inches of fuel existed in the UST at the time of the inspection on June 18, 2002. The ATG was programmed to run a weekly leak test according to the printouts. The earliest printout for a leak test was dated March 4, 2001. The last leak test printout was dated June 23, 2002.

21. The printouts for the period March 4, 2001 through June 23, 2002, indicated nine failed tests during that period.

22. On January 8, 2003, Mr. Whitebull informed the facility that EPA planned to reinspect it for UST compliance on January 9, 2003.

23. On January 9, 2003, EPA inspectors Sandy Stavnes and Renee Bellew, accompanied by Mr. Whitebull, reinspected the facility to determine leak detection compliance. At the time of the reinspection, the inspectors observed that the piping was still connected to the UST, the dispenser was open, and approximately 1.5 inches of fuel existed in the UST.

24. Mr. Yellow signed the Notice of Inspection prepared by the inspectors identifying the UST violations(s) noted by the inspectors.

25. At the time of the January 9, 2003 inspection, the inspectors observed no monthly leak detection or cathodic protection testing for the UST.

**Count 1**  
**(Failure to maintain release detection monitoring results)**

26. Pursuant to the requirements of 40 C.F.R. § 280.45(b), all UST system owners and operators must maintain records in accordance with 40 C.F.R. § 280.34 demonstrating compliance with all applicable requirements of this subpart including, the results of any

sampling, testing, or monitoring must be maintained for at least one (1) year or for another reasonable time period determined by the implementing agency.

27. Respondents failed to maintain every result of sampling, testing or monitoring for release detection for at least one (1) year for the months of August 2001, September 2001, October 2001, November 2001, April 2002, May 2002, and July 2002.

28. Respondent's failure to maintain every result of sampling, testing or monitoring for release detection for at least one year for the months of August 2001, September 2001, October 2001, November 2001, April 2002, May 2002, and July 2002, constitutes a violation of RCRA § 9003(c), 42 U.S.C. § 6991b(c), and 40 C.F.R. § 280.45(b).

**Count 2**  
**( Failure to operate in accordance with the manufacturer's instructions)**

29. Respondents are required to perform monthly leak detection for the UST pursuant to 40 C.F.R. § 280.41.

30. In accordance with 40 C.F.R. § 280.40(a)(2), UST owners and operators must provide a method, or combination of methods, of release detection that is installed, calibrated, operated and maintained in accordance with the manufacturer's instructions, including routine maintenance and service checks for operability or running condition.

31. Respondents failed to operate the ATG in accordance with the manufacturer's instructions for the months of May 2001, February 2002, March 2002 and June 2002.

32. Respondents' failure to operate the ATG in accordance with the manufacturer's instructions in May 2001, February 2002, March 2002 and June 2002, constitutes a violation of RCRA § 9003(c), 42 U.S.C. § 6991b(c), and 40 C.F.R. § 280.50.

**Count 3**  
**(Failure to report a suspected release)**

33. Pursuant to the requirements of 40 C.F.R. § 280.50, owners and operators of UST systems must report to the implementing agency within 24 hours, or another reasonable time

period specified by the implementing agency, for conditions including, but not limited to, (c) failed leak tests indicating that a release may have occurred.

34. Respondents failed to report a suspected release to the implementing agency within 24 hours based on failed leak test results on March 11, 2001, March 25, 2001, April 1, 2001, April 8, 2001, April 15, 2001, December 21, 2001, December 30, 2001, January 6, 2002 and January 13, 2002.

35. Respondents' failure to report a suspected release to the implementing agency within 24 hours of failed leak test results constitutes a violation of a violation of RCRA § 9003(c), 42 U.S.C. § 6991b(c), and 40 C.F.R. § 280.50.

#### **Count 4 (Failure to investigate a suspected release)**

36. Pursuant to the requirements of 40 C.F.R. § 280.52, owners and operators of UST systems must immediately investigate and confirm all suspected releases of regulated substances requiring reporting under 40 C.F.R. § 280.50 within seven (7) days, or another reasonable period specified by the implementing agency, using prescribed or approved procedures by the implementing agency.

37. Respondents failed to investigate and confirm all suspected releases within seven (7) days of the failed leak test results on March 25, 2001, April 1, 2001, April 8, 2001, April 15, 2001, December 30, 2001, January 6, 2002 and January 13, 2002.

38. Respondents' failure to investigate and confirm a suspected release within seven days of nine separate failed leak tests constitutes a violation of a violation of RCRA § 9003(c), 42 U.S.C. § 6991b(c), and 40 C.F.R. § 280.52.

#### **PROPOSED CIVIL PENALTY**

RCRA § 9006(d)(2)(C), 42 U.S.C. § 6991e(d)(2)(C), authorizes the assessment of a civil penalty of up to \$11,000 for each UST for each day of violation. Based upon the facts alleged in this Complaint and taking into account the factors prescribed by statute, i.e., the seriousness of



the violations and any good faith efforts by Respondents to comply with the applicable requirements, Complainant proposes to assess a civil penalty of \$33,371.00 as follows:

<u>COUNT</u>	<u>VIOLATION</u>	<u>PROPOSED PENALTY</u>
Count 1	Failure to maintain sampling, testing or monitoring results for release detection for at least one year, 40 C.F.R. § 280.45(b),	\$544
Count 2	Failure to operate the ATG in accordance with the manufacturer's instructions, 40 C.F.R. §280.40(a)(2)	\$3,463
Count 3	Failure to report a suspected release, 40 C.F.R. § 280.50	\$9,788
Count 4	Failure to investigate suspected releases within 7 days, 40 C.F.R. § 280.52	\$19,576

**TOTAL PROPOSED PENALTY: \$33,371.00**

The proposed civil administrative penalty above has been calculated in accordance with the U.S. EPA Penalty Guidance for Violations of UST Regulations (November 1990) (Exhibit 1). This policy is used by EPA to provide a rational and consistent application of the statutory factors to the facts and circumstances of a specific case. The Penalty Calculation Worksheets for the alleged RCRA UST violation in support of the assessment of civil penalties proposed in this Complaint are attached hereto (Exhibit 2).

**TERMS OF PAYMENT**

If Respondent does not contest the findings and penalty proposal set out above, this action may be resolved by paying the proposed penalty in full. If such payment is made within thirty (30) calendar days of receipt of this Complaint, then no Answer need be filed. For more time for payment, Respondent may file a statement agreeing to pay the penalty within thirty (30) days of receipt of the Complaint, then pay the money within sixty (60) days of such receipt. Payment is to be made by sending a certified or cashier's check payable to "Treasurer, United States of America," to:

EPA Region 8  
(Regional Hearing Clerk)  
Mellon Bank  
P.O. Box 360859M  
Pittsburgh, PA 15251

A copy of the check must be mailed simultaneously to:

Amy Swanson, Enforcement Attorney  
Legal Enforcement Program  
U.S. EPA Region 8 (8ENF-L)  
999 - 18th Street, Suite 300  
Denver, Colorado 80202-2466

Payment of the penalty in this manner shall constitute consent by Respondents to the assessment of the proposed penalty and a waiver of Respondents' right to a hearing on this matter.

### **OPPORTUNITY TO REQUEST A HEARING**

As provided in RCRA § 9006(b), 42 U.S.C. § 6991e(b), a respondent has the right to request a public hearing within thirty (30) calendar days after this Complaint is served. If you (1) contest the factual claims made in this Complaint; (2) wish to contest the appropriateness of the proposed penalty; or (3) assert that you are entitled to judgment as a matter of law, you must file a written Answer in accordance with 40 C.F.R §§ 22.15 and 22.37 within thirty (30) calendar days after this Complaint is received.

Your answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint; (2) state all facts and circumstances, if any, which constitute grounds for defense; (3) state the facts intended to be placed at issue; and (4) specifically request an administrative hearing, if desired. The denial of any material fact or the raising of any affirmative defense in your Answer shall be construed as a request for a hearing. Failure to deny any of the factual allegations in this Complaint constitutes an admission of the undenied allegations.

The answer and one copy must be sent to the EPA Region VIII Regional Hearing Clerk (8RC), 999 - 18th Street, Suite 300, Denver, Colorado 80202-2466, and a copy must be sent to the enforcement attorney listed below.

**IF YOU FAIL TO REQUEST A HEARING, YOU MAY WAIVE YOUR RIGHT TO FORMALLY CONTEST ANY OF THE ALLEGATIONS SET FORTH IN THE COMPLAINT.**

IF YOU FAIL TO FILE A WRITTEN ANSWER WITHIN THE 30 CALENDAR DAY TIME LIMIT, A DEFAULT JUDGMENT MAY BE ENTERED PURSUANT TO 40 C.F.R § 22.17. THIS JUDGMENT MAY IMPOSE THE PENALTY PROPOSED IN THE COMPLAINT.

### **SETTLEMENT CONFERENCE**

EPA encourages the exploration of settlement possibilities through an informal settlement conference. Please note that a request for, scheduling of, or participation in a settlement conference does not extend the period for filing an answer and request for hearing as set out above. The settlement process, however, may be pursued simultaneously with the administrative litigation procedures found in 40 C.F.R. Part 22. If a settlement can be reached, its terms shall be expressed in a written consent agreement, signed by the parties and incorporated into a final order signed by the regional judicial officer. A request for a settlement conference or any questions that you may have regarding this Complaint should be directed to the attorney listed below.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, REGION 8,  
Complainant.

Date: 03/11/03

By: David Janik  
Michael T. Risner, Director  
David J. Janik, Supervisory Attorney  
Legal Enforcement Program

Date: 3-5-03

By: SIGNED  
Sharon L. Kercher, Director  
Technical Enforcement Program

Date: 3/5/03

By: SIGNED  
Amy Swanson, Enforcement Attorney  
U.S. EPA, Region 8  
999 18<sup>th</sup> Street, Suite 300 (8ENF-L)  
Denver, CO 80202-2466  
Colorado Atty. Reg. No. 26488  
Telephone: 303/312-6906  
Facsimile: 303/312-6953

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the original and one copy of the COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING with Exhibits 1 and 2 were hand-carried to the Regional Hearing Clerk, EPA, Region VIII, 999 18th Street, Denver, Colorado, and that a true copy of the same was mailed by certified mail to:

Aurene M. Martin, Acting Assistant Secretary-Indian Affairs  
U.S. Department of the Interior  
1849 C Street N.W.  
Washington, D.C. 20240

Cora L. Jones, Regional Director  
Great Plains Regional Office  
Bureau of Indian Affairs  
U.S. Department of the Interior  
115 Fourth Avenue S.E.  
Aberdeen, SD 57401

Steve Yellow, Facilities Manager  
Standing Rock Agency  
Bureau of Indian Affairs  
U.S. Department of the Interior  
P.O. Box E  
Fort Yates, ND 58538

4/2/03  
Date

Judith M. McTernan  
Signature

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS PLEASE CONTACT THE REGIONAL HEARING CLERK.**

**THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON APRIL 2, 2003.**